

**KOREA'S  
INITIAL COMMENTS ON  
THE RECENT FCC PROPOSAL  
TO REVISE SECTION 214 AND SECTION 310  
FOREIGN MARKET ACCESS/OWNERSHIP REGULATIONS**

April 22, 1995

DOCKET FILE COPY ORIGINAL  
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95-22

**I. OVERVIEW**

Korea understands that the recent FCC's proposal to revise the foreign market access/ownership regulations concerning Section 214 and 310 of the U.S. Communications Act of 1934 intends to achieve the following three main goals:

- Promotion of effective competition in the global communications market;
- Prevention of anti-competitive conduct in international telecommunications;
- Encouraging foreign governments to open their communications markets.

These goals are not, on their face, objectionable.<sup>1</sup> However, the FCC's proposal for implementing for these goals may present problems in facilitating the ongoing "NGBT(Negotiating Group on Basic Telecommunications)" negotiations.

Specifically, the FCC proposes to implement its international telecommunications market goals by adopting a "reciprocity" standard in its implementation of Sections 214 and 310 of the Communications Act. The FCC argues that this "reciprocity" standard would be used as a tool to open the telecommunications markets of foreign countries.

This approach risks violating one of the key ground rules of the "NGBT" negotiations — i.e., the standstill requirement.<sup>2</sup> Indeed, the result of the FCC's proposal could be an overall tightening of restrictions on global telecommunications market access, as other countries seek to emulate the U.S. model in order to protect their national telecommunications entities.

<sup>1</sup> These proposals are currently in draft forms; at present, it is not possible to assess whether the final formulation of these goals would pose problems for foreign countries.

<sup>2</sup> Paragraph 7 of the Ministerial Decision on Basic Telecommunications provides that: Commencing immediately and continuing until the implementation date to be determined under paragraph 5, it is understood that no participant shall apply any measure affecting trade in basic telecommunications in such a manner as would improve its negotiating position and leverage.



## II. SECTION 214 AUTHORITY

### A. Overview of The FCC Proposal

At present, the FCC considers only the following factors in conducting the "public interest" test for Section 214: (1) national security; (2) the openness of other telecommunications segments of the foreign carrier's primary markets; and (3) the ability and incentive of the foreign carrier to discriminate against unaffiliated U.S. carriers. The FCC balances its policy in favor of open market entry against the potential for undue discrimination by a foreign carrier against unaffiliated U.S. carriers. The current rules do not prohibit foreign-owned or affiliated carriers from acquiring and operating international switched and private line facilities on a common carrier basis in the United States.

The FCC proposal would add the following element as part of the public interest test for Section 214 proposes:

*Whether U.S. carriers, either currently or in the near future, have the ability to provide "basic, international telecommunications facilities-based services in the primary markets<sup>3</sup> served by the foreign carrier seeking entry" into the U.S. market.*

The FCC would consider the following factors, none of which would be dispositive, to determine whether effective market access exists;

- (1) whether U.S. carriers can offer in the foreign country international facilities-based services substantially similar to those the foreign carrier seeks to offer in the United States;
- (2) whether competitive safeguards exist in the foreign country to protect against anti-competitive and discriminatory practices, including cost allocation rules to prevent cross-subsidization;
- (3) the availability of published, nondiscriminatory charges, terms and conditions for interconnection to foreign domestic carriers' facilities for termination and origination of international services;
- (4) timely and nondiscriminatory disclosure of technical information needed to use or interconnect with carriers' facilities;
- (5) the protection of carrier and customer proprietary information; and
- (6) whether an independent regulatory body with fair and transparent procedures is established to enforce competitive safeguards.

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<sup>3</sup> A "primary market" is defined in the FCC's proposal as "one where a carrier has a significant facilities-based presence," and thus could encompass far more than the home market of the foreign telecommunications entity.



## B. Comments

1. In light of the April 1996 deadline for conclusion of the NGBT, and the necessity for all participants to focus on the multilateral negotiations, the FCC proposals may undermine the multilateral discussions through the introduction of new controversial aspects. It is afraid that the FCC's proposals risk inviting foreign carriers and governments to respond with their own market entry restrictions.
2. Through the addition of a new "effective market access" inquiry to the Section 214 "public interest" test, the United States may violate the standstill requirement of the Ministerial Decision on Basic Telecommunications.
  - Foreign investment in wireline-based U.S. operators could be severely restricted under the FCC proposal. At present, foreign investors are allowed to own and operate -- without any restriction -- wireline-based common carrier networks in the United States, including cable TV networks.
  - While the FCC asserts that it is attempting to liberalize telecommunications market access, the proposed market entry standard could introduce a new source of uncertainty and delay, and would require applicants to clear additional hurdles beyond those currently applicable.
3. Foreign carriers and administrations could view lengthy delays in processing applications and additional reporting requirements under the revised public interest standard as a de facto restriction on entry into the U.S. market.
  - For example, the FCC proposal to assess not only the openness of a foreign carrier's home market, but also the foreign carrier's "primary markets" could be more burdensome than necessary in processing applications by foreign carriers to enter the U.S. market.

## III. SECTION 310 AUTHORITY

### A. Overview of The FCC Proposal

At present, Section 310(b)(4) allows foreign investors to control an indirect ownership interest of a maximum of 25% in U.S. broadcast and common carrier radio license holders. Foreign investment above this benchmark is permitted only in instances where the FCC determines that such investment would serve the "public interest." The FCC does not currently consider issues of reciprocal market access in making its Section 310(b) "public interest" determinations.

The FCC proposes to begin considering such reciprocal market access issues in deciding whether to allow foreign investment above the 25% statutory benchmark, as a means of encouraging the opening of the foreign basic telecommunication service markets.



## B. Comments

1. Because the FCC's proposals with regard to Section 310(b) are very general, and are couched as a form of a "market opening," there is no obvious violation of the standstill requirement. However, because the adoption of a reciprocal market access standard in the implementation of the Section 310(b) authority would likely result in greater delay and uncertainty in the processing of requests to exceed the current 25% benchmark, it is possible that these FCC's proposals would constitute a de facto violation of the standstill requirement.

-- This would be particularly true if the FCC adopted, for Section 310(b) purposes, its Section 214 "primary market" test for determining reciprocal market access.

2. Moreover, the proposed reciprocity approach for Section 310(b) decisions may serve to strengthen the negotiating position of the United States in the NGBT, thereby resulting in a violation of the spirit of the standstill requirement.